

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Time Warner Cable Inc.	)	
	)	MB Docket No. 12-171, CSR 8662-E
Petitions for Determination of Effective	)	
Competition in Communities in Wisconsin	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 5, 2016**

**Released: April 6, 2016**

By the Senior Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION AND BACKGROUND**

1. Time Warner Cable Inc. (“Time Warner” or the “Company”) has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(4) and 76.907 of the Commission’s rules for a determination that the Company is subject to effective competition in the communities listed on Attachment A (the “Communities”) because of competing service provided by a local exchange carrier (“LEC”). Time Warner alleges that its cable systems serving the Communities are subject to effective competition pursuant to Section 623(l)(1)(A) of the Communications Act of 1934, as amended (“Communications Act”),<sup>1</sup> and the Commission’s implementing rules,<sup>2</sup> and that it is therefore exempt from cable rate regulation in the Communities because of the competing service provided by AT&T Wisconsin (“AT&T”). Comments were filed by the Town of Delafield and the Cities of Waukesha and New Berlin (the “Commenters”). Time Warner filed a response.<sup>3</sup>

2. In June 2015, a Commission order adopted a rebuttable presumption that cable operators are subject to one type of effective competition, commonly referred to as competing provider effective competition.<sup>4</sup> Accordingly, in the absence of a demonstration to the contrary, the Commission now presumes that cable systems are subject to competing provider effective competition, and it continues to presume that cable systems are not subject to any of the other three types of effective competition, as defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission’s rules.<sup>5</sup> For the reasons set forth below, we grant Time Warner’s petition.

**II. PROCEDURAL ARGUMENTS**

3. The Commenters allege that the petition is procedurally defective because the Wisconsin

<sup>1</sup> See 47 U.S.C. § 543(l)(1)(D).

<sup>2</sup> 47 C.F.R. § 76.905(b)(4).

<sup>3</sup> We note that Time Warner filed two responses, one of which is confidential and the other for public inspection. See Letter from Craig. A. Gilley, Edwards Wildman Palmer LLP, Counsel for Time Warner, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission (“Time Warner Response”) (filed March 18, 2014).

<sup>4</sup> See *Amendment to the Commission’s Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, Report and Order, 30 FCC Rcd 6574 (2015) (“*Effective Competition Order*”).

<sup>5</sup> See 47 U.S.C. § 543(l)(1); 47 C.F.R. §§ 76.905(b), 76.906.

State Department of Financial Institutions (“Department”), and not the Commenters, is the franchising authority that should have been named as a party in the petition’s caption.<sup>6</sup> We find that the omission of the Department from the petition’s caption does not mean that the petition is procedurally defective. Time Warner explained that there is no procedural defect because the Department was properly and timely served, and the service to the individual municipalities was done only as a courtesy.<sup>7</sup> In addition, further notice of the Petition was available to the Department through the Commission’s Public Notice of the filing.<sup>8</sup> Thus, service of the petition was sufficient.

### III. THE LOCAL EXCHANGE CARRIER TEST

4. Time Warner’s petition seeks a finding of LEC effective competition for the Communities. The statutory test for a finding of LEC effective competition requires that the LEC or its affiliate offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, provided the video programming services thus offered are comparable to the video programming services provided by the unaffiliated cable operator in that area.<sup>9</sup> The Commission has stated that an incumbent cable operator could satisfy the LEC effective competition test by showing that the LEC is technically and actually able to provide services that substantially overlap the incumbent operator’s service in the franchise area.<sup>10</sup> It is undisputed that the Communities are served by both Time Warner and AT&T, a local exchange carrier, that these two MVPDs are unaffiliated, and that AT&T provides comparable programming to Time Warner.<sup>11</sup> Time Warner has demonstrated that AT&T otherwise satisfies the LEC effective competition evidentiary requirements set forth in the *Cable Reform Order*.<sup>12</sup>

5. The City of New Berlin questions the extent of AT&T’s buildout in that community, contending that areas in the southern and western portions of the community are not within AT&T’s service area and thus that the test for LEC effective competition is not met.<sup>13</sup> This argument is not persuasive because the LEC effective competition test does not require any particular penetration level.<sup>14</sup>

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<sup>6</sup> Letter from Eric J. Larson, Town Attorney for the Town of Delafield, Wisconsin to the Federal Communications Commission at 1 (Jul. 3, 2012); Letter from Miles Eastman, Assistant City Attorney for the City of Waukesha, Wisconsin to William Lake, Chief, Media Bureau, Federal Communications Commission at 1 (Jul. 11, 2012); Letter from Mark G. Blum, City Attorney for the City of New Berlin, Wisconsin to William Lake, Chief, Media Bureau, Federal Communications Commission at 1 (Sept. 28, 2012) (“City of New Berlin Letter”).

<sup>7</sup> See Time Warner Response at 1.

<sup>8</sup> Public Notice, Report No. 0376, Special Relief and Show Cause Petitions (June 22, 2012). We note that the Department did not elect to participate in this proceeding by filing comments or an opposition.

<sup>9</sup> 47 U.S.C. § 543(1)(1)(D); see also 47 C.F.R. § 76.905(b)(4).

<sup>10</sup> See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305 (1999) (“*Cable Reform Order*”). The incumbent also must show that the LEC intends to build-out its cable system within a reasonable period of time if it has not already done so, that no regulatory, technical or other impediments to household service exist, that the LEC is marketing its services so that potential customers are aware that the LEC’s services may be purchased, that the LEC has actually begun to provide services, the extent of such services, the ease with which service may be expanded, and the expected date for completion of construction in the franchise area. *Id.* at 5305.

<sup>11</sup> Petition at 7.

<sup>12</sup> See *Cable Reform Order*, 14 FCC Rcd at 5305-06, ¶¶ 13-15. See also Petition at 3-6.

<sup>13</sup> City of New Berlin Letter at 1.

<sup>14</sup> *Cable Reform Order*, 14 FCC Rcd at 5303.

Time Warner has demonstrated that AT&T's video subscriber penetration among the City of New Berlin's 16,292 Census occupied households is significant indicating that AT&T's service area substantially overlaps Time Warner's service in the franchise area.<sup>15</sup> The City of New Berlin does not provide any evidence to counter that submitted by Time Warner. Accordingly, we find that Time Warner has submitted sufficient evidence demonstrating that its cable system serving the Communities has met the LEC test and is subject to effective competition.

#### IV. THE COMPETING PROVIDER TEST

6. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multichannel video programming distributors ("MVPDs"), each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.<sup>16</sup> This test is referred to as the "competing provider" test. Pursuant to the *Effective Competition Order*, absent evidence to the contrary, the Commission presumes that the competing provider test is met. Accordingly, even if we determined that Time Warner failed to satisfy its burden of demonstrating LEC effective competition in the Communities, we would presume that Time Warner was subject to competing provider effective competition in the Communities.

#### V. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Time Warner Cable, Inc. **IS GRANTED** as to the Communities listed on Attachment A hereto.

8. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to or on behalf of any of the Communities set forth on Attachment A **ARE REVOKED**.

9. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>17</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker  
Senior Deputy Chief, Policy Division, Media Bureau

<sup>15</sup> See Time Warner Response at 1 (Confidential Response – Not for Public Inspection). The Town of Delafield and the Cities of Waukesha and New Berlin did not request access to Time Warner's Confidential Response.

<sup>16</sup> 47 U.S.C. § 543(l)(1)(B); see also 47 C.F.R. § 76.905(b)(2).

<sup>17</sup> 47 C.F.R. § 0.283.

## ATTACHMENT A

MB Docket No. 12-171, CSR 8662-E

## COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUIDs
Big Bend, Village of	WI0628
Butler, Village of	WI0344
Delafield, Town of	WI0570
Elm Grove, Village of	WI0346
Genesee, Town of	WI0569
Lisbon, Town of	WI0402
Menomonee Falls, Village of	WI0233
Mukwonago, Town of	WI0547
Mukwonago, Village of	WI0489
Muskego, City of	WI0455
New Berlin, City of	WI0260
Pewaukee, City of	WI0350; WI0794
Pewaukee, Village of	WI0351
Sussex, Village of	WI0304
Vernon, Town of	WI0542
Wales, Village of	WI0571
Waukesha, City of	WI0142
Waukesha, Town of	WI0356